OPINION BELOW.

No opinion was written by the District Court. The opinion of the Circuit Court of Appeals, printed in Appendix C hereto, *infra*, pp. 17-18, is reported in 227 F. 2d, at page 312.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on November 23, 1955 (R. 270). Rehearing was denied on December 27, 1955 (R. 275). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

Whether a federal court in a diversity case may disregard a conclusive presumption of timely notice of injury created under the Workmen's Compensation Act of the state where it is sitting, and give the act a construction diametrically opposed to that given it by the highest judicial tribunal in the state.

Whether the purpose of *Erie* v. *Tompkins* may be defeated by a federal court refusing to apply the law announced by the highest court of the state where it is sitting in a diversity case, on the mistaken theory that a presumption of timely notice of injury made conclusive by law unless denied under oath is a subject of "procedural" rather than "substantive" law.

Whether the fixing of the burden of proof by a state Workmen's Compensation Act as to the timely giving of notice of injury may be nullified in a diversity case by a federal court sitting in the state because such rule of evidence is conceived by it to be procedural.

STATUTES INVOLVED.

The statutory provisions involved are: 62 Stat. 944 (28 U. S. C. A., Sec. 1652); Article 8307, Sec. 4a; Article 8307b, Revised Civil Statutes of Texas (Workmen's Compensation Act); and Texas Rule of Civil Procedure 815. The provisions listed are printed in Appendix A, *infra*, pages 14-15.

STATEMENT OF THE CASE.

Petitioner instituted suit under the Workmen's Compensation Act of Texas for total and permanent incapacity resulting from industrial injury (R. 1-12). Jurisdiction of the District Court of the United States for the Eastern District of Texas, Tyler Division, was invoked by reason of the amount sought being for more than $3,000.00, and on account of a diversity of citizenship (R. 2).

The trial was to a jury, and pursuant to its verdict, judgment for $8,832.64 was entered on behalf of petitioner, representing compensation for total permanent incapacity (R. 21-28).

The provisions of the Workmen's Compensation Act of Texas require the giving of notice of injury to the employer or insurer within 30 days after the happening thereof, unless it have actual notice or good cause for delay be shown (Article 8307, Section 4a, R. C. S. 1925, Appendix A, page 14). However, the same act provides that where suit is filed on a claim thereunder, the timely giving of notice of injury "shall be presumed to be true as plead * * * unless denied by verified pleadings" (Article 8307b, R. C. S., Texas, Appendix A, page 15).[1]

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[1]For the Court's convenience, we copy the applicable portions of Article 8307b, R. C. S. 1925 of Texas, in the margin, as follows:

Petitioner pleaded both that the respondent was given notice of his injury within 30 days of its occurrence, and that his employer had actual notice thereof within such time (Paragraph X, R. 8). By its original answer, respondent denied the allegations regarding notice, but such denial was not verified as required by the Texas Workmen's Compensation Act (Paragraph 10, R. 14-15).

Following the filing of the original answer by the respondent on August 24, 1954 (R. 12), it was allowed to amend during the week of the trial by adding a paragraph to the original answer (R. 17), at which time it made no effort to verify its pleading with respect to the denial of the timely giving of notice by petitioner.

Counsel for petitioner started to develop the question of whether seasonable notice of injury had been given by petitioner, but was properly interrupted by the trial Court, who stated that the question of notice was not an issue in the case (R. 63-64 and Summary, R. 35-36). Obviously, the trial judge correctly concluded that he was bound by the state statute on the subject of the burden of proving the required notice, and respected the same by refusing the request of respondent for leave to verify by amendment which was made during the trial rather than not

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"In the trial of any case appealed to the court from the board the following, if plead, shall be presumed to be true as plead and have been done and filed in legal time and manner, unless denied by verified pleadings:

"(1) Notice of injury; * * *

"Such denial may be made in original or amended pleadings, but if in amended pleadings such must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them must be proved. Added Acts 1937, 45th Leg., p. 535, ch. 261, Sec. 2."

less than seven days before the case proceeded to trial (R. 36).

The Circuit Court reversed and remanded the cause for the sole reason that it conceived Article 8307b, R. C. S. 1925, to operate as a rule of practice and procedure, which was not applicable to or binding on trials in Federal Courts.[2]

REASONS FOR ALLOWING WRIT.

If the decision below remains undisturbed, an injured claimant under the Texas Workmen's Compensation Act may win his case if it is filed in a Texas state court, but lose the same case, if he has the misfortune of finding himself in a federal court sitting in the state. Geographically, the federal court may be located a block and a half from the location of the state court (as is indeed the case in the city where the present suit was tried), but the law applied by each will be poles apart. Of the 50,000 yearly claimants under the Texas Compensation Act,[3] those fortunate enough to find themselves in state court on appeal will enjoy a presumption of jurisdictional facts;[4] whereas,

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[2]For the convenience of the Court, we copy the controlling portions of the opinion in the margin, thus:

> "Here the appellee defends the action of the court by reference to Art. 8307-b, Vernon's Civil Statutes of Texas, and Rule 820 of Texas Rules of Civil Procedure, adopting all portions of the Texas Workmen's Compensation law which related to matter of practice and procedure, and cites Texas cases in support.
>
> "This will not do. It is settled law that neither the Texas Statutes nor State rules governing practice and procedure in the State Courts are applicable to, or binding on, trials in Federal Courts" (Appendix C, p. 18, *infra*).

[3]Annual Report, Industrial Accident Board of Texas for the fiscal year ending August 31, 1954.

[4]*Southern Underwriters* v. *Tullos,* (Tex. S. Ct.) 151 S. W. 2d 789.

those unfortunates who land in the federal courts sitting in the state will be denied the same statutory presumption that would have been granted in the state courts.

The judicial nose-thumbing in the direction of the established state policy declared by statute and judicial interpretation here involved is of grave consequences. The matter of giving timely notice of injury goes to the heart of an action by an injured claimant under the Texas Compensation Act. Indeed, in the absence of such notice or excuse therefor, the courts do not even have jurisdiction to enforce a claim on behalf of the injured party.[5] Where a defendant files an unsworn denial to allegations of timely notice in a compensation case, and on trial the plaintiff produces no proof thereof, under the state rule of decisions, he would be entitled to recovery; but under the rule presently existing in this case, a federal court would direct a verdict against the plaintiff in the same case. Thus, a substantial right upon which a plaintiff may rely in the state court with confidence will, in the federal court, take the form of a snare and delusion to those unacquainted with the existing decision in this case.

The applicable statutes relieved compensation claimants from the burden of proving proper notice of injury through the creation of a presumption of law. This legal presumption became no less a substantive right through the happenstance that in creating it, the Legislature provided a means of rebuttal through the filing of a verified plea. The Compensation Act being in derogation of the common law, its provisions should be interpreted as mandatory and exclusive. The express provisions of the statute, and its interpretation by the highest judicial tri-

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[5]*Mingus* v. *Wadley*, (Tex. S. Ct.) 285 S. W. 1054, 1087; *Tex. Empl. Ins. Asso.* v. *Evans*, (Tex. S. Ct.) 298 S. W. 516.

bunal in Texas, should not be disregarded in diversity cases unless compelling reasons so require. It is earnestly believed that the decision of the Circuit Court herein would not have been upheld during the reign of *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865, 871, and that most certainly, it flies in the face of the logic and philosophy underlying *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and subsequent cases interpreting it.

The Supreme Court of Texas, being that of last resort in the state, construed the statute under consideration in *Southern Underwriters* v. *Tullos*, 151 S. W. 2d 789, 790. It pronounced that where the plaintiff pleaded the facts treated therein, their truth would be "conclusively presumed" unless denied under oath. To quote from the opinion:

> "Since the insurance company filed no sworn denial, the allegations of the employee's petition *must be accepted as true.* Consequently there was no need for the injured employee to prove the truth of his allegations, nor to secure a finding of the jury thereon" (Emphasis supplied).[6]

Cases from the intermediate Courts of Civil Appeals in Texas are treated in Appendix B, page 16, *post*, to illustrate unanimity of opinion on the subject.

It will be observed that the District Judge in the present case faithfully followed the Act and the construction placed upon it by the Texas Supreme Court. We believe the Circuit Court had the same duty of accepting the stat-

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[6]The Texas Supreme Court reaffirmed this holding in *LeBeau* v. *Highway Underwriters*, 187 S. W. 2d 73, 75, saying in part: "The conclusion follows that, absent the verified plea, there is no competent evidence on the question."

FEB 3 1956
HAROLD B. WILLEY, Cl

No. 660.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1955.

BILL G. BLUNT, PETITIONER,

VS.

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JOHN W. HARDY,
711 Bryant Petroleum Building,
Tyler, Texas,
JONES, BRIAN & JONES,
P. O. Box 347,
Marshall, Texas,
Counsel for Petitioner.

Of Counsel:

FRANKLIN JONES,
C. A. BRIAN,
P. O. Box 347,
Marshall, Texas.

E. L. MENDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 1-3030

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No. .....

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

BILL G. BLUNT, PETITIONER,

VS.

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Bill G. Blunt respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on November 23, 1955.

ute as construed by the Texas Supreme Court.[7] Indeed, this Court has considered a state statute, upheld by its court of last resort, as expressive of state policy, and gone on to say that: "The essence of diversity jurisdiction is that a Federal court enforces State law and State policy" (*Angel* v. *Bullington*, 330 U. S. 183, 191, 91 L. Ed. 832, 838). Even where the highest Court of the state has not spoken on a subject, the federal courts are not free to disregard the decisions of the intermediate courts and apply "general law" contrary thereto. The obvious purpose of the Judiciary Act, and we quote, "is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship" (*West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 236, 85 L. Ed. 139, 144).

The same philosophy has been applied in following *Erie* v. *Tompkins* (304 U. S. 72, 82 L. Ed. 1191). The extreme applicability of the conclusions expressed in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109-110, 89 L. Ed. 2079, 2086,[8] by Mr. Justice Frankfurter (in diversity cases a federal court is "only another court of the state"), encourages us to quote extensively from his opinion as follows:

> "The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should

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[7] *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd.*, 315 U. S. 740, 747, 86 L. Ed. 1154, 1163; *Great Northern Ry. Co.* v. *Sunburst Oil & Refg. Co.*, 287 U. S. 358, 362, 77 L. Ed. 360, 365; *United States of America* v. *State of Texas*, 314 U. S. 480, 86 L. Ed. 356, 362; and see annotation following *Wichita Royalty Co.* v. *City National Bank of Wichita Falls*, 83 L. Ed. 515, at page 521.

[8] See annotation following report of this case in 160 A. L. R. 1243.

not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure,' we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, *Cities Serv. Oil Co.* v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201, as to conflict of laws, *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020, as to contributory negligence, *Palmer* v. *Hoffman*, 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A. L. R. 719. And see *Sampson* v. *Channell*, 110 F. 2d 754."

We believe that irrespective of a trip through the morass of distinctions between "substantive" and "procedural" law, we have demonstrated that the opinion of the Court of Appeals has decided an important state question in a way in conflict with applicable state law, so as to call for the granting of writ herein under this Court's Rule 19, subdivision (b) (28 U. S. C. A., "Rules," pamphlet p. 12). However, in deference to the opinion below, we do examine the question of whether the Texas statute created procedural or substantive rights, or both.

SUBSTANTIVE RIGHTS CREATED BY TEXAS STATUTE.

In last analysis, the effect of Article 8307b, R. S. 1925 Texas, Appendix A, page 15, was to relieve all claimants under the Workmen's Compensation Act of the necessity of proving the giving of timely notice, by means of the erection of a conclusive legal presumption that the same had been given. It is true that the presumption was rebuttable, but it remained a legal presumption until and unless its factual basis was denied under oath. We conceive that the point that the right created was substantive in nature is foreclosed by the decision of this court in *Palmer*

v. *Hoffman*, 318 U. S. 109, 117, 87 L. Ed. 645, 651. The opinion there reads in part:

> "The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487), must apply. *Cities Serv. Oil Co.* v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201; *Sampson* v. *Channell*, (C. C. A. 1st) 110 F. 2d 754, 128 A. L. R. 394. And see *Central Vermont R. Co.* v. *White*, 238 U. S. 507, 512, 59 L. Ed. 1433, 1436, 35 S. Ct. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265."

By merely changing the term "contributory negligence" to "the giving of notice of injury under the Texas Compensation Act," the holding in the *Palmer* case would become directly applicable to the question we raise. The mere circumstance that the opposing party is given a means of rebutting the legal presumption created, or of renewing the burden of proving the fact on the plaintiff, does not affect the substantive nature of the right. We regret that our search has disclosed no decision by this Court bearing directly on the last statement, but we feel the reasoning of the District Court in *Mark* v. *City of Ormond Beach*, 113 Fed. Sup. 504, 505, to be worth following. The Florida statute there concerned[9] created a presump-

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[9]For convenience, we set out material parts of the statute (Sec. 51.12, Florida Statutes Annotated) in the margin:

> In action for damage through operation of motor vehicle by one other than owner, the statute declares it necessary for the declaration to merely allege operation of the vehicle by the driver thereof and the name of its owner, without characterizing the legal relationship existing between owner and driver, or averring any fact related to authority or consent of the owner with respect to use of the vehicle. In the event the owner seeks to deny liability on such ground, and we quote, "such defense shall be set forth in a special plea or special pleas to the declaration, particularly alleging the facts upon which said owner relies for his denial of liability for

tion of liability against the owner of a motor vehicle where the declaration filed alleged ownership and its operation by a named driver. Defense could be urged only if it were set forth in a special plea to the declaration, in which event the presumption of liability would be subject to rebuttal. Bear in mind that in the *Mark* case, the defendant admitted that the complaint was properly drawn under the Florida statute, but contended that Federal rules should apply rather than the state statute. The trial court found no difficulty in concluding that the presumption established by the statute created a substantive right, the benefit of which the plaintiff was entitled to receive in the federal court as well as in the state court.

Of similar import is the decision of the District Court in *U. S.* v. *Davis*, 125 Fed. Sup. 696, 700, which treated an Arkansas statute providing a presumption of genuineness of a written instrument attached to pleadings, unless its genuineness was first denied under oath.

In both of the cited cases, the mere means of rebutting the presumption created by statute were considered unimportant in resolving the question of whether the statute created a substantive or a procedural right. This was but an extension of the analogy made by the Fourth Circuit Court of Appeals in *Metropolitan Life Ins. Co.* v. *Goodwin*, 92 F. 2d 274, 276, wherein a rebuttable presumption of death after seven years' absence was discussed. As in the

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such acts of said driver. Upon trial of any such action, the plaintiff therein, with respect to the element of liability of said owner for such acts of said driver, shall be required only to prove by competent evidence the ownership of said vehicle and the driver thereof at the time of the alleged negligent operation of the same, to establish a presumption of liability of said owner for any such negligent acts of said driver in his operation of such vehicle, said presumption being subject to rebuttal by said owner by competent evidence within the limits of the facts set forth in any such special plea or pleas."

instant case, the presumption was there created by state statute, the crucial portion of which stated that the absentee would be presumed dead in any case wherein his death should come in question, and we quote "unless proof be made that he was alive within that time (seven years)." The Court there had no difficulty in concluding that the presumption created was one of substantive law, declaring that for procedural purposes, a certain probative force would be attached to a given state of facts until evidence sufficient to prove the contrary was introduced.

In *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208, 212, 84 L. Ed. 196, 198, the Court of Appeals for the Fifth Circuit had refused to recognize a Texas rule, "supported by a multitude of Texas cases" (101 F. 2d 315), that the burden of proof of establishing the issue of good faith purchaser rested upon the party attacking the legal title. The intermediate court considered itself bound to apply the federal rules of equity which refused to so place the burden, saying:

> "We have here *not a case where a Texas statute has created the right asserted, or has created a presumption,* or is in any manner to be applied as construed in Texas. The question is simply what is the proper practice in courts of equity" (*Cities Service Oil Co.* v. *Dunlap*, 101 F. 2d 314, 316. Emphasis supplied).

On certiorari this Court reversed, on the ground that the question presented related "to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely."

The quotation from the *Dunlap* opinion in the Fifth Circuit Court of Appeals would lead the average reader to believe that the Court would have considered itself bound by a statute of Texas that created the right or presumption being dealt with. What else have we here?

In conclusion, we remind that those responsible for establishing the Texas Rules of Civil Procedure considered the presumption created by Article 8307b (R. C. S. 1925, Appendix A, p. 15), to be a substantive right, unaffected by the adopted rules. This is manifest from a consideration of the list of repealed statutes enumerated when the rules were adopted, and which definitely omits Article 8307b therefrom (see *Vernon's Annotated Texas Rules, Civil, Franki*, p. 155 *et seq.*). Furthermore, by Rule 815 (*ibid*, 146), it was cautiously stated that the rules "shall not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action."

We respectfully urge that the writ prayed for should issue.

JOHN W. HARDY,
711 Bryant Petroleum Building,
Tyler, Texas,

JONES, BRIAN & JONES,
P. O. Box 347,
Marshall, Texas,
Counsel for Petitioner.

Of Counsel:

FRANKLIN JONES,
C. A. BRIAN,
Attorneys for Petitioner.

APPENDIX A.

62 Stat. 944 (28 U. S. C. A., Sec. 1652): State Laws As Rules of Decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, ch. 646, 62 Stat. 944.

Article 8307, Sec. 4a (R. C. S. of Texas, 1925). Notice of Injury; Claim for Compensation.

Sec. 4a. Unless the association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the association or subscriber within thirty days after the happening thereof, and unless a claim for compensation with respect to such injury shall have been made within six months after the occurrence of same; or, in case of death of the employe or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity. For good cause the board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing the claim before the board. Acts 1917, p. 269.

Article 8307b, Revised Civil Statutes of Texas, 1925 (Workmen's Compensation Act). Presumptions on Appeal from Board; Denial by Verified Pleadings.

In the trial of any case appealed to the court from the board the following, if plead, shall be presumed to be true as plead and have been done and filed in legal time and manner, unless denied by verified pleadings:

(1) Notice of injury;

(2) Claim for compensation;

(3) Award of the board;

(4) Notice of intention not to abide by the award of the board;

(5) Filing of suit to set aside the award.

Such denial may be made in original or amended pleadings; but if in amended pleadings such must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them must be proved. Added Acts 1937, 45th Leg., p. 535, ch. 261, § 2.

Texas Rule of Civil Procedure 815.

These rules shall not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action.

APPENDIX B.

The intermediate appellate courts of Texas (Courts of Civil Appeals) have uniformly considered Article 8307b, R. C. S. 1925, as creating a legal presumption of the existence of the facts enumerated, thus:

Texas Employers' Insurance Association v. *Warren*, 149 S. W. 2d 182, 183: The failure to comply with the statute "concluded the issue * * * by a legal presumption."

Bedner v. *Federal Underwriters' Exchange*, 133 S. W. 2d 214, 217: The absence of verified pleading, "concludes such issues by a legal presumption * * *."

Continental Fire & Casualty Ins. Corp. v. *Snow*, 213 S. W. 2d 720, 721: An improper verification was held insufficient, in consequence of which pleaded fact was "conclusively presumed."

National Auto & Casualty Ins. Co. v. *Layman*, 248 S. W. 2d 993, 1000: The rule created a presumption of the questioned fact, and the same not having been denied by verified pleading, "the presumption becomes conclusive."

Southern Underwriters v. *Jones*, 137 S. W. 2d 52, 61: A failure to file a verified denial of crucial facts caused it to be "presumed that all those requirements were complied with."

Texas Indemnity Ins. Co. v. *Briggs*, 128 S. W. 2d 861, 864: In absence of verified denial, timely filing of claim as alleged "must be presumed to be true."

Southern Underwriters v. *Jordan*, 122 S. W. 2d 260, 261: The jurisdictional facts not having been denied under oath, "will be presumed to have existed as alleged * * *."

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15500

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,
Appellant,

versus

BILL G. BLUNT, Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(November 23, 1955.)

Before HUTCHESON, Chief Judge, and TUTTLE and BROWN, Circuit Judges.

PER CURIAM: Appealing from a judgment on a verdict entered in a Texas Workmen's Compensation suit, the defendant is here insisting that the court erred in refusing to try[1] the tendered issue, whether plaintiff gave the required thirty day notice of his claimed injury as required by law, and that the judgment must be reversed. We agree.

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[1]The matter came about in this way. The plaintiff pleaded notice. The defendant, in Par. X of its unverified answer, denied the allegations regarding notice. Thereafter the plaintiff, to the defendant's question, "Did you give notice to your employer about your getting hurt?", answered, "No," and the court querying "Is the denial of notice under issue in this case?", and stating, "The rule requires that the denial be under oath or it be admitted,"

Here the appellee defends the action of the court by reference to Art. 8307(B), Vernon's Civil Statutes of Texas, and Rule 820 of Texas Rules of Civil Procedure, adopting all portions of the Texas Workmen's Compensation law which relates to matters of practice and procedure, and cites Texas cases in support.

This will not do. It is settled law that neither the Texas Statutes nor State rules governing practice and procedure in the State courts are applicable to, or binding on, trials in federal courts.[2]

The judgment is REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

APPEARANCE AND PROOF OF SERVICE.

I, FRANKLIN JONES, hereby enter my appearance in the present cause, and certify that I served the Respondent herein with a true and correct copy of the foregoing Petition for Writ of Certiorari by depositing the same in the United States Post Office, with First Class Postage prepaid, and addressed to counsel of record for said ~~petitioner~~ respondent at his post office address.

This the ..... day of ....., A. D. 1956.

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ruled: "We are not trying the issue unless a denial is made under oath as the rule requires."

A discussion as to the admissibility of the evidence then ensued, the defense counsel contending that the failure to give the notice was an issue inasmuch as it was a statutory defense, and the plaintiff's counsel contending that it was not an issue since the defendant had filed no sworn denial. Subsequent to the discussion and while the evidence was still being presented in the case, the defense counsel requested, and the court denied, leave to amend the pleading by swearing to the denial, and at the close of the evidence he again so moved and was again denied.

[2]Barron & Holtzoff on Federal Practice & Procedure, Vol. 1, 1955 Docket Part, Sec. 138 at p. 111; *Gifford* v. *Wichita Falls and So. Ry. Co.*, 224 F(2) 374.

HAROLD B. WILLEY, Cle

No. 660

In the

Supreme Court of the United States

October Term, 1955

BILL G. BLUNT,

Petitioner,

v.

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HOBERT PRICE,
ROYAL H. BRIN, JR.,
300 Gulf States Building,
Dallas 1, Texas,
Counsel for Respondent.

Of Counsel:
STRASBURGER, PRICE, KELTON, MILLER & MARTIN,
Dallas, Texas.

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No. 660

In the

Supreme Court of the United States

October Term, 1955

BILL G. BLUNT,

Petitioner,

v.

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is somewhat misleading and argumentative.

This is a case arising under the Workmen's Compensation Act of the State of Texas, in which Bill G. Blunt sought recovery of compensation from Employers Mutual Liability Insurance Company of Wisconsin, the Workmen's

compensation insurance carrier for Blunt's employer. Defendant specifically pleaded as a defense that the plaintiff was not entitled to recover because he did not give notice within thirty (30) days, as required by law, of his claimed accident to his employer or the insurance carrier, and that no good cause existed for such failure. Although defendant's answer specifically and expressly denied that plaintiff had given such notice, this pleading was not sworn to. This unsworn answer denying notice had been on file for a month and a half before trial, but no exception or objection was taken thereto on the ground that it was not verified.

The first complaint of lack of verification came in the middle of the jury trial, while the evidence was being offered. The reporter's transcript was a little confused as to exactly how this happened, but the matter was clarified by the Trial Court by a bill setting this part of the record (Record, pp. 35-37). In this bill signed by the Trial Court and approved by counsel for both parties, it is declared that, while plaintiff was on the stand, an objection was made by plaintiff's counsel to the introduction of evidence relative to whether or not notice of injury was given within thirty (30) days; that the Court then inquired of both counsel as to whether or not this was in issue, and was informed that the defendant had specifically pleaded that such notice had not been given, but that such pleading was not under oath; that the Court then ruled that notice or the lack of it was not at issue, because of the absence of a sworn denial.

As further shown by the bill, while the evidence was still being presented, the defense counsel went on to request

and move the Court to allow him to amend the answer by swearing to the denial of the thirty (30) day notice, which motion was denied; and that further, at the close of the evidence, defense counsel again moved the Court to allow him to amend by attaching an affidavit to his pleadings, and the Court again overruled this motion.

Before all this happened, plaintiff had already admitted on the witness stand that he did not give notice within thirty (30) days of the accident.

The case went to the jury and the Court did not charge on the matter of thirty (30) day notice and did not allow defendant to argue lack of it as a defense. A verdict was returned of total and permanent disability, and judgment for plaintiff rendered thereon.

Defendant perfected its appeal to the United States Court of Appeals for the Fifth Circuit, and that Court reversed and remanded the cause to afford a trial on the merits of the issue of thirty (30) day notice.

II.

ARGUMENT

SUMMARY OF THE ARGUMENT

POINT ONE

The cause was properly reversed and remanded since the form of pleadings is a procedural matter upon which the Texas Rules of Civil Procedure are not binding upon the ~~State~~ Federal Courts, and under the Federal practice, no verification was required.

POINT TWO

Under both Federal and Texas practice, the lack of verification, even if required, was waived by the failure to object or except thereto before trial.

POINT THREE

Under both Texas and Federal practice, if verification were required, defendant's counsel should have been allowed to amend the answer by swearing to it, when he offered to do so.

POINT ONE—(Restated)

The cause was properly reversed and remanded since the form of pleadings is a procedural matter upon which the Texas Rules of Civil Procedure are not binding upon the ~~State~~ Federal Courts, and under the Federal practice, no verification was required.

The Court of Appeals correctly held that the Trial Court erred in refusing to try the defense of failure to give notice within thirty (30) days, where defendant had properly pleaded such defense, even though it was not sworn to.

This case was tried in a United States District Court, and it is elemental that the Federal Rules of Civil Procedure and not the State Rules of Civil Procedure govern the trial of cases in the Federal Courts.

The requirement of verification relied upon by Petitioner originally arose from *Article 8307b, Revised Civil Statutes of Texas,* in which verified pleading of certain

defenses, including lack of notice of injury, was required. This provision was carried forward into the *Texas Rules of Civil Procedure*, when those rules were adopted in 1941, by *Rule 93(n)*, which is worded as follows:

"RULE 93. Certain Pleas To Be Verified.

"A pleading setting up any of the following matters, unless the truth of such matter appear of record, shall be verified by affidavit.

"* * *.

"(n) In the trial of any case appealed to the court from the Industrial Accident Board the following, if pleaded, shall be presumed to be true as pleaded and have been done and filed in legal time and manner, unless denied by verified pleadings:

"(1) Notice of injury.

"(2) Claim for compensation.

"(3) Award of the Board.

"(4) Notice of intention not to abide by the award of the Board.

"(5) Filing of suit to set aside the award.

"(6) That the insurance company alleged to have been the carrier of the workmen's compensation insurance at the time of the alleged injury was in fact the carrier thereof.

"(7) That there was good cause for not filing claim with the Industrial Accident Board within the six months' period provided by statute.

"A denial of any of the matters set forth in Sections (1) or (7) of this Subdivision (n) may be made on information and belief.

"Any such denial may be made in original or amended pleadings; but if in amended pleadings the same must be filed not less than seven days before

> the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them, must be proved."

Also pertinent is *Rule 820*, which provides:

> "All portions of the Workmen's Compensation Law, Title 130, of the Revised Civil Statutes of Texas, 1925, and amendments thereto, which relate to matters of practice and procedure are hereby adopted and retained in force and effect as Rules of Court."

Thus, the present status of the requirement of verification of denial of thirty (30) day notice is that of a Rule of Court and part of the Texas Rules of Civil Procedure.

In *Barron & Holtzoff* on *Federal Practice and Procedure*, *Section 333*, the subject of verification is dealt with as follows:

> "Pleadings need not be verified or supported by affidavit, except in those cases in which verification or affidavit is 'specifically required by rule or statute.' The rule is somewhat ambiguous in its use of the terms 'statute' and 'rule' without definition or limitation. The rule undoubtedly requires verification in those rare and special situations in which a statute of the United States so provides. Whether verification or affidavit required by State statute or rule is even necessary in the Federal Court is doubtful and, in any event, not of any great importance."

The reason given that the question is not of great importance is that the Federal Court would allow the party to amend by swearing to the pleading, if the question should come up during trial. (See Point Three.)

In diversity of citizenship cases in the Federal Courts, the procedure is governed by the Federal rules, and substantive rights and liabilities are governed by the law of the State. It is difficult to see how anything could be more clearly procedural than the matter of the form of a pleading, particularly with respect to whether or not it is verified.

The need for verification in the State practice is completely obviated in the Federal Courts by the provision in *Rule 11* of the *Federal Rules of Civil Procedure* that the signature of an attorney to a pleading constitutes a certificate by him that he has read it, that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay. Thus, in the Federal Courts every pleading is in effect verified by the signature of the attorney.

The theory of generally dispensing with sworn pleadings in Federal Court is that "court disciplining of attorneys who sign and thereby certify pleadings is more effective in preventing abuse of pleadings than is prosecution of parties for perjury." *Cyclopedia of Federal Procedure, 3rd Edition, Sec. 14.66.*

From the standpoint of interpretation of the language of Rule 11 as to "rule or statute," it would certainly seem that when a Federal Rule of Civil Procedure speaks of the requirements of "rule or statute," without further designation, it is referring to Federal rule or Federal statute.

The Federal Courts have consistently held that matters of pleading are procedural and, therefore, not controlled by the State practice. Thus, in *Michelson v. Penney, 135 Fed. 2d 409*, the Court declares:

> "Since this is a matter of Federal pleading, that is, of what is fair notice from the complaint, Clark, Code Pleading, 1948, 75, 83, 513, State precedents are not controlling."

Another such case is *Peterson v. Chicago Great Western Railway, 3 F. R. D. 346*. There, under the State decisions, it was required that the law of a foreign State must be specially pleaded, but it was held that as this was merely a requirement of pleading, it did not control in Federal Court.

Swift & Co. v. Young, 107 F. 2d 170, declares:

> "In matters of pleading we are governed no longer by the state practice but by the Federal Rules of Civil Procedure."

In *Granite Trust Bldg. Corp. v. Great Atlantic & Pacific Tea Co., 36 F. S. 77*, plaintiff contended that the defense of want of authority to execute a contract was not in issue because a Massachusetts statute as interpreted by the Massachusetts cases provided validity would be admitted unless a specific denial was filed within a stated time. The Federal Court considered the defendant's answer insufficient to satisfy that statute, if it were to govern, but went on to hold that since the Conformity Act has been superseded by the Federal Rules of Civil Procedure, the sufficiency of pleadings to raise the issue of authority was

to be determined solely by reference to the Federal Rules, under which the answer was sufficient.

Another such case is *Rothschild v. Ritter, 4 F. R. D. 495,* holding pleadings in Federal Court were governed not by the Pennsylvania Rules of Civil Procedure but by the Federal Rules, even in connection with an action for wrongful death under the substantive law of Pennsylvania.

In *Sibbach v. Wilson & Co., 312 U. S. 1, 85 L. Ed. 479,* this Honorable Supreme Court of the United States points out that "important" or "substantial" rights are not necessarily "substantive," and declares that, "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." The present question of verification of pleadings is much more clearly within the definition of procedure than the question of physical examination then before the Court.

The substantive law on the matter in question here is that a workmen's compensation claimant must give notice to his employer within 30 days of the claimed injury, in the absence of good cause for failing to do so. This substantive law is, of course, applicable in the Federal Court. However, the manner of pleading a defense under this substantive law, whether it be under oath or not, is a matter of procedure, and the State Rules of Procedure and Practice are not binding upon the Federal Courts.

Petitioner declares that the holding of the Court of Appeals will result in different outcomes of the same case when tried in the State and Federal Courts. This is not correct. If the present case had been pleaded and tried in the State Court, the denial of 30 days' notice would have been sworn to as a matter of course. The reason that the pleading was not verified in the present case is that it was pending in Federal Court, and counsel, therefore, considered the form of the pleading to be governed by Federal practice rather than State practice.

Most of the cases cited by Petitioner deal with the burden of proof, such as *Palmer v. Hoffman, 318 U. S. 109, 87 L. Ed. 645.* What is involved in the present case is not the burden of proof of the thirty (30) days' notice, but merely the manner of pleading the lack of it. In dealing with presumptions, Petitioner entirely failed to see the distinction between a presumption based upon the facts of the case, which may well be substantive, and a presumption based merely upon the state or form of the pleadings, which are the work of the attorneys, as opposed to the operative facts of the cause of action which arose out of the acts of the parties.

Petitioner, in conclusion, argues that the Texas Rules of Civil Procedure consider this matter to be substantive because Article 8307b is not listed in the enumeration of repealed statutes. However, the exact opposite is shown

by an examination of the Texas Rules, and in particular by *Rule 820* quoted above, which adopts the portions of the Workmen's Compensation Law relating to practice and procedure, and retains them in force as Rules of Court. This is further borne out by *Rule 819* which provides:

> "All procedure prescribed by statutes of the State of Texas not specifically listed in the accompanying enumeration of repealed articles shall, insofar as the same is not inconsistent with the provisions of these rules, continue in accordance with the provisions of such statutes as Rules of Court. In case of inconsistency between the provisions of these rules and any statutory procedure not specifically listed as repealed, these rules shall apply."

The text of this Rule certainly shows that the mere fact that an article is not enumerated in the list of repealed articles does not mean that it was considered as substantive rather than procedural, since this rule expressly recognizes and deals with statutory articles not included in the enumeration but which prescribe procedure.

Moreover, at the end of the very enumeration relied on by Petitioner *(Vernon's Annotated Texas Rules of Civil Procedure, Vol. 4, p. 156)*, the Supreme Court of Texas expressly declares:

> "It is recognized that there are additional procedural provisions intermingled with the substantive portions of other articles of the statutes, and perhaps some procedural articles standing alone, which have not been listed above."

That the requirement of verification was considered precedural by the Supreme Court of Texas in promulgating the Rules of Civil Procedure is directly and clearly shown by the express setting forth of this requirement in *Rule 93(n)*. Since 1941, the need of verification of a denial of notice in the Texas Courts is by virtue of *Rule 93(n)* of the Texas Rules of Civil Procedure, which has supplanted Article 8307b. This is borne out by all of the Texas cases arising since the adoption of the Rules, including *Federal Underwriters Exchange v. Brigham, 184 S. W. 2d 849 (1944); LeBeau v. Highway Insurance Underwriters, 187 S. W. 2d 73 (Supreme Court of Texas, 1945); Traders & General Insurance Co. v. Bass, 193 S. W. 2d 848, Er. ref., N. R. E. (1946); Perez v. Consolidated Underwriters, 206 S. W. 2d 163, Er. ref., N. R. E. (1947); Continental Fire & Cas. Ins. Corp. v. Snow, 213 S. W. 2d 720 (1948)*, and *National Automobile & Cas. Ins. Co. v. Layman, 248 S. W. 2d 993, Er. ref., N. R. E. (1952)*. Petitioner erroneously lists the latter two cases in Appendix B of his Petition for Certiorari as cases considering Article 8307b; examinations of the opinions shows that they actually consider and are rested upon not Article 8307b but *Rule 93(n)*. The footnote on Page 7 of the Petition in its context likewise erroneously indicates that the Supreme Court of Texas was construing "the statute," Article 8307b, in the *LeBeau* case, when it too construes *Rule 93(n)*.

Certainly a requirement of the Texas Rules of Civil Procedure is a procedural requirement, and as such does not control procedure in the Federal courts.

POINT TWO—(Restated)

Under both Federal and Texas practice, the lack of verification, even if required, was waived by the failure to object or except thereto before trial.

It is Respondent's position that since this case was tried in a Federal District Court, it should have been tried under the Federal Rules of Civil Procedure and not the Texas Rules of Civil Procedure; however, even if it be held that a verified pleading was required in the Federal Court in compliance with the State procedure, still the cause was properly reversed and remanded under both the Texas and Federal precedents.

In those rare cases in Federal practice where verification is required, it is still held that any objection to the lack of verification must be promptly made or it will be waived. As declared in *Barron & Holtzoff Federal Practice and Procedure, Section 333, page 579:*

> "Despite the requirement of verification, the law is definite and well settled that any objections to lack of verification must be raised immediately or not at all."

Cases to this effect include *Rosaly v. Gonzalez, 106 Fed. 2d 169*, and *Leidigh Carriage Company v. Stengel, 95 Fed. 637.*

It will be remembered that in the present case, we do not have a situation in which the defense with respect to notice was not pleaded at all; defendant's answer specifically al-

leged that plaintiff failed to give notice within thirty (30) days of his supposed injury, and the only claimed defect to such pleading is the lack of verification. The answer containing this defense was on file more than a month and a half before trial, and no exception or objection was directed to the lack of verification by Petitioner until the trial was under way and evidence was being offered.

Even if Petitioner should claim that the matter of waiver of defect in pleading is in itself substantive so that the State practice should be followed, the Supreme Court of Texas has held that the failure to object or except to lack of verification to a pleading, when required, constitutes a waiver of the defect. In *Watson v. Texas Indemnity Insurance Company, 210 S. W. 2d 989*, the Supreme Court of Texas declares:

> "(1) Watson urges that the company failed to join issue on good cause since the verified denial contained in an amendment to the company's answer was filed only the day before the trial began, and he further insists that the answer did not contain an adequate denial of good cause. The rule provides that an allegation of good cause shall be presumed to be true unless denied by verified pleadings and that an amended pleading denying this matter must be filed not less than seven days before trial. Rule 93(n), Texas Rules of Civil Procedure. The Court of Civil Appeals overruled this contention, correctly reasoning that Watson had waived these points. This holding is approved."

In the opinion of the Court of Civil Appeals, *207 S. W. 2d 99*, which the Supreme Court was expressly approving, it was pointed out that no exception to the alleged defect in

the verification of defendant's answer was filed by the plaintiff. It was held that the defect, if any, was waived by the failure to object or except.

Other Texas cases in accord include *Wade v. Superior Ins. Co., 244 S. W. 2d 893 (W. E. ref.)*, and *Texas Osage Co-Op. Royalty Pool v. Kemper, 170 S. W. 2d 849 (W. E. ref.)*.

Even more directly in point is the case of *Ramsey v. Cook, 231 S. W. 2d 734*. In this case, the defendant's answer included an unverified plea of failure of consideration, but the plaintiff did not except to lack of verification before trial, and it was held that the Trial Court erred in refusing to allow evidence in support of this plea. The opinion states the case as follows:

> "Appellee, plaintiff in the trial court, brought suit against appellant for a balance of $360.46 on a promissory note, plus interest and attorney's fees, and for a balance of $37.80 on a sworn account. Defendant's answer was in part a plea of want of consideration. It was not verified. At the close of plaintiff's testimony the Court refused to hear defendant's testimony in support of his plea on the ground that the answer was not verified. Defendant then asked leave to amend his answer by having it sworn to, but the court refused to permit him to amend, and, a jury having been waived, rendered judgment for plaintiff for the amount sued for.
>
> "As just stated, the answer was not verified, but plaintiff did not except to the lack of verification. He did, however, object to evidence in support of defendant's plea on the ground that the plea was not sworn to.

> "Under Rule 93, Texas Rules of Civil Procedure, the defenses set up in defendant's answer were required to be verified. * * *."

The situation was thus parallel to that in the present case.

In reversing and remanding the judgment for plaintiff on the grounds of the error of the Trial Court in this connection, the Court states the Texas law as follows:

> "Beginning with William v. Bailes, 9 Tex. 61, the courts have held many times that verification of a plea of want or failure of consideration is waived by failure to object to the lack of verification. In the cited case the trial court excluded evidence in support of the plea of want of consideration on the ground that it was not sworn to. The Supreme Court held that exclusion of such evidence was improper, and reversed on that single ground, where the plaintiffs had not by exception pointed out the lack of verification before the trial began. While there are many reported opinions which declare generally that a plea of want or failure of consideration must be verified to be effective, the rule of Williams v. Bailes has been followed in numerous cases and has not been overruled. See Exchange Nat. Bank v. Parsons, Tex. Civ. App., 116 S. W. 2d 817, and other cases there cited. For discussions and citations of pertinent cases relating to various phases of the general question of waiver of sworn pleadings, see the case notes in 12 Texas Law Review 369; 25 Texas Law Review 430, and 27 Texas Law Review 564."

Thus, in both the Texas practice and the Federal practice, failure to except before trial to a claimed defect in the form of a pleading constitutes a waiver thereof, and this has been specifically held in cases of lack of verification. The Petitioner in the present case did not except to

the unsworn plea of failure to give thirty (30) days' notice or raise the matter in any way until the trial was actually in progress, and therefore even if the lack of veridication were a defect, it was waived.

POINT THREE—(Restated)

Under both Texas and Federal practice, if verification were required, defendant's counsel should have been allowed to amend the answer by swearing to it, when he offered to do so.

It is further Respondent's position that in any case the cause was correctly reversed and remanded for the error of the Trial Court in refusing to allow the defendant to verify his pleading of failure to give notice of injury, even if the Texas Rules of Civil Procedure applied to the trial of the case in the United States District Court. Under both Federal and Texas practice, such amendment should have been allowed.

The closest Federal case in point in *Franzen v. E. I. du-Pont deNemours & Co., 30 Fed. Sup. 375.* That was a case in which plaintiff sought to recover compensation under the Employers' Liability Act of Louisiana. Objection was made that the complaint was defective because it was not verified, as required by the Louisiana Act. The Federal Court, in overruling the motion to dismiss, discussed the question as follows:

> "Rule 11 of Federal Civil Procedure, 28 U. S. C. A., following section 723c, provides: '* * * Except when otherwise specifically provided by rule or statute,

pleadings need not be verified or accompanied by affidavit.'

"[4] Under this rule verification is the exception and not the rule and Rule 11 only requires the signing of all pleadings, Hummel v. Wells Petroleum Co., 7 Cir., 111 F. 2d 883. Whether or not the above means that verification under a state statute would likewise be required in this court has not thus far been determined in the decisions under these rules. We do not think the point is important, because if defendant intends to press this contention, plaintiff has indicated her willingness to supply any deficiency by way of amendment under Rule 15 of the Federal Rules of Civil Procedure."

As declared in *Encyclopaedia of Federal Procedure, 3rd Edition, Section 18.22:*

"The lack of required verification of a complaint may be rectified by appropriate amendment."

The attitude of Federal Courts on such questions is shown by *DeMontis v. Potomac Electric Power Co., 1 F. R. D. 119.* There, plaintiffs moved to strike defendant's answer because it was not properly signed by an attorney of record in his individual name, and defendant thereupon asked leave to have the answer previously filed signed by an attorney of record in his individual name. It was held that defendant was entitled to do so, and that the answer should not be stricken.

Cases clearly showing that it is the Federal practice to allow a party to amend an unverified pleading by swearing to it when objection is made to the lack of verification, in those few cases where the Federal practice re-

quires verification, include *Yuri Yajima v. U. S., 6 F. R. D. 260*, and *In Re Royal Circle of Friends Building Corp., 159 Fed. 2d 539.*

It would certainly seem that the allowing of amendments to pleadings in a Federal Court is a matter of procedure governed by the Federal practice rather than the State practice, but in any case, the Texas practice also would require the Trial Court to permit amendment in the present situation.

In the case of *Ramsey v. Cook, 231 S. W. 2d 734*, discussed under Point Two above, after holding that failure to except before trial to the lack of verification was a waiver of any such defect, the Court went on to declare that in any case it was error for the Trial Court to have refused to allow defendant to swear to his plea during the trial when he offered to do so:

> "In view of the present rule allowing trial amendments, Rule 66, it might be that a trial court could properly refuse to admit evidence in support of an unsworn plea of want or failure of consideration unless the pleader would then verify his pleading, but in the case before us the defendant sought to amend his plea by swearing to it, which would have been the equivalent of filing a trial amendment. Even if we be in error in thinking that the rule declared in Williams v. Bailes applies here, we hold under authority of Vermillion v. Haynes, 147 Tex. 359, 215 S. W. 2d 605, that it was error for the trial court to refuse defendant leave to amend his plea by swearing to it and then offer proof in support of it.
>
> "Reversed and remanded."

Thus, even if the Texas Rules of Civil Procedure and the Texas law in connection therewith were applicable, under those very rules and the Texas cases construing them, the Trial Court was still in error in refusing to allow defendant to amend by swearing to his plea of failure to give notice, and the cause was correctly reversed and remanded. There could be no element of surprise to Petitioner since the plea of lack of notice had been on file for over a month and a half before trial.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, that the judgment of the United States Court of Appeals for the Fifth Circuit properly reversed and remanded the cause to afford Respondent an opportunity to try out its defense of lack of notice, and that the Petition for a Writ of Certiorari should be denied.

Dated the ..... day of ....., 1956.

HOBERT PRICE,
ROYAL H. BRIN, JR.,
300 Gulf States Building,
Dallas 1, Texas,

By.....
Counsel for Respondent.

Of Counsel:
STRASBURGER, PRICE, KELTON, MILLER & MARTIN,
Dallas, Texas.

APPEARANCE AND CERTIFICATE OF SERVICE

I, Royal H. Brin, Jr., hereby request the Clerk to enter my appearance as counsel for the Respondent and as one of the attorneys for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1956, I served true and correct copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari upon Petitioner by depositing the same in the United States Post Office with first class postage prepaid, and addressed to John W. Hardy, 711 Bryant Petroleum Building, Tyler, Texas, and Franklin Jones, P. O. Box 347, Marshall Texas, Petitioner's attorneys of record, on this the ..... day of ....., 1956.

.....

Attorney for Respondent.

MAR 9 1956
HAROLD B. WILLEY, C

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 660.

BILL G. BLUNT, PETITIONER,

VS.

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, RESPONDENT.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT.

JOHN W. HARDY,
711 Bryant Petroleum Building,
Tyler, Texas,
JONES, BRIAN & JONES,
P. O. Box 347,
Marshall, Texas,
Counsel for Petitioner.

Of Counsel:

FRANKLIN JONES,
C. A. BRIAN,
P. O. Box 347,
Marshall, Texas.

R. L. Mercantile, Inc., 924 Wyandotte, Kansas City, Mo., HArrison 1-0020

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 660.

BILL G. BLUNT, PETITIONER,

VS.

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, RESPONDENT.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT.

THE STATEMENT MADE BY RESPONDENT.

If, as charged by respondent, petitioner's statement of the case was misleading, it was due to the state of the record.

The bill of exception prepared by respondent (R. 35-36) is at complete variance with the official transcript of the proceedings (R. 63-64). The writer was not present

during the trial and cannot account for this, but felt bound by the choice made by the Appeals Court (footnote 1, 227 Fed. Rep. 2d 312, page 17, pet. cert.). It clearly accepted the version that the trial court stopped the proceedings on his own initiative, albeit the appeals court mistakenly assumed the question concerning notice was asked by counsel for respondent instead of counsel for petitioner.

Respondent's comment that before request for an amendment of the pleading the "plaintiff had already admitted on the witness stand that he did not give notice within 30 days of the accident" requires elaboration. We quote the applicable portion of the record thus:

(The plaintiff is being questioned by his counsel.)

"Q. Now, Bill, did you give any notice to your employer about your getting hurt?

A. No, sir.

Q. Now, while you were in the Hospital—

The Court: Now, just a moment, is the denial of notice under issue in this case, Mr. Newberry (counsel for respondent)?

Mr. Newberry: Your Honor, we denied it and we don't plead it.

The Court: Well, the rule requires—

Mr. Newberry: And we did not take notice under oath.

The Court: The rule requires that the denial be under oath or it be admitted.

Mr. Newberry: Well, we didn't do so, Your Honor.

The Court: Well, we are not trying the denial of the oath unless a denial is made under oath as the rule requires.

Mr. Newberry: Well, I don't want to be arbitrary with the Court.

The Court: It is not a question of being arbitrary. We are not going to try the question of notice, go ahead" (R. 63-64).

In proper perspective this "admission" desperately seized upon by respondent will be seen to have amounted to no more than the beginning by counsel for petitioner to question him on the complete subject of notice, which necessarily would have embraced an inquiry as to whether the respondent had actual notice of petitioner's injury, a fact that would have excused petitioner's failure to give notice (see Article 8307, Section 4a, R. C. S., Texas 1925, Appendix A, page 14, pet. cert.).

The manner in which the question under discussion arose would have been of little moment, had not respondent sought to avoid the effect of the Appeal Court's refusal to apply state law and policy by urging a waiver against petitioner. It is seen that there was no waiver, but positive action on the part of the trial court to prevent the useless trial of a fact that was not issuable under the Texas law.

REPLY TO POINT ONE OF RESPONDENT.

Respondent eagerly asserts the Texas statutory requirement of notice of injury within thirty days to be one of substantive law (its brief, p. 9). It concedes it to be applicable in the Federal Courts, but without so much as a "by your leave," it seeks to avoid the substantive rights given a compensation claimant by the same statute, in the nature of a presumption that the required notice has been given. This presumption becomes no less a substantive right through the circumstance of the contemporaneous creation of a means of avoiding it. The steps to be taken in avoidance constitute conditions precedent to any attack on the

presumption, and the fact that they are to be taken by way of pleading does not alter the substantive characteristics of the original presumption.

The respondent would look to the local law for the bar created by failure of timely notice, but disregard it wherein the same law prescribed the condition alone under which the bar could operate. This would be completely out of harmony with the decisions of this court in *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 93 L. Ed. 1524, and *Ragan* v. *Merchants Transfer and Warehouse Co.*, 337 U. S. 530, 93 L. Ed. 1520, 1523, the latter of which holds:

> "But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. * * * Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co.* v. *Tompkins* is transgressed."

To us, the ultimate question appears to be whether the statutory provision that relieves a compensation claimant of going forward with proof, and by its fiat proclaims certain things admitted, creates a substantive right, irrespective of the conditions alone under which the right may be challenged. To say that because the presumption may be avoided by the timely filing of a verified plea makes the right created by it procedural, is to beg the question, as we see it. Even if the right be considered partly substantive and partly procedural, surely the dog should wag the tail, and not the tail the dog.

Each of respondent's contentions under its Point One are in complete disregard of the specific holding of this Court in *Palmer* v. *Hoffman*, 318 U. S. 109, 87 L. Ed. 645, 651, from which we quote as follows:

> "Respondent contends in the first place that the charge was correct because of the fact that Rule 8(c) of the Rules of Civil Procedure makes contributory negligence an affirmative defense. We do not agree. Rule 8(c) covers only the manner of pleading." (This quotation immediately precedes that found on page 10 of the petition for certiorari.)

By the same process of analysis, the Federal Rules of Civil Procedure may cover matters of pleading generally, but they cannot operate to destroy what otherwise would be a valid presumption under state law. Indeed, the presumption created by the Texas statute is of more substantive value to petitioner than was the freedom from the burden of proving contributory negligence to the petitioner in the *Hoffman* case.

The respondent has been the victim of the commentator in 26 *Marq. L. Rev.* 200 (as summarized U. S. C. A. 28, Fed. Rule 8(c), Note 5, page 255). At the time of publication, that unhappy writer proclaimed that by adopting Rule 8(c), this Court had declared the defense of contributory negligence to be a matter of procedure rather than one of substance. The respondent seems to be still barking up this empty tree.

Our position is strengthened by the fact that not only all of the Courts in Texas consider the statutory provision in question to create a presumption, but even the text writers agree, as evidence this quotation from 10 Tex. Jur. 10-Year Supplement, p. 146, Workmen's Compensation, Section 294b:

> "An allegation as to notice of injury which is not denied by the insurer by a verified pleading is presumed to be true as plead."

Hence, we see the presumption viewed as a substantive right, subject to qualification by the filing of a verified plea.

REPLY TO POINT TWO OF RESPONDENT.

Respondent's contention under its Point Two approaches the frivolous. Not the slightest element of waiver of the presumption vouchsafed the petitioner by statute can be gleaned from the record herein. If the transcript is to be believed, the petitioner may have been willing to try out the issue of actual notice or good cause by consent, but it was the trial court which put a stop to the proceedings (see page 2 herein and R. 63-64). On the other hand, if the "bill" (R. 35) is to be accepted, the petitioner objected to the evidential attack on the conclusive presumption of notice erected by statute so soon as it made its appearance. In either event, there is not the slightest indication of a waiver.

In citing *Rosaly* v. *Gonzalez,* 106 F. 2d 169, and cases of similar import, respondent has again lost sight of the presumption created by statute, and treated the missing verification as a mere matter of form. This might have been the case had it dealt only with the pleading, but as we have perhaps tediously reiterated, the statute created a presumption, and the requirement of verification became a condition precedent to its attack. The respondent seems to have been overly cautious in its failure to fully acquaint the Court with the nature of the waiver existing in the case of *Watson* v. *Texas Indemnity Insurance Company,* 210 S. W. 2d 989 (its brief 14), on which it so heavily relies. The truth of the matter is that a verified denial was filed in that case one day before trial, and the appellee did not, and we quote, "by motion or otherwise call the alleged defect to the attention of the trial court at any time during the trial of the cause" (207 S. W. 2d 100). In short, the claimant there allowed the issue to be tried by consent (See Texas Rule of Civil Procedure 67, and F. R. C. P. 15(b)),

and for the first time on appeal sought to rely on the abandoned presumption rather than the record made. It is painfully obvious from the present record that the trial judge (and properly so) was in no mood to put up with the tomfoolery incident to the trial of an issue on which the state law had fastened a conclusive presumption. In fine, the petitioner was in no position to waive the presumption by not demanding verification of the pleading, nor to try the issue by consent, due to the view taken by the trial court.

Be this as it may, the Texas courts have continued to regard the presumption under discussion as conclusive (see petition for certiorari, pp. 7 and 16), as evidenced by this quotation from 27 *Texas Law Review* 565:

> "Prior to the Rules such presumption (of due notice) was conclusive regardless of lack of objection to a defective special plea. *Bedner* v. *Federal Underwriters Exchange,* 133 S. W. 2d 214 (Tex. Civ. App. 1939, error dism'd, judgm't correct). Since the Rules this has continued to be the holding of the courts despite express provision in the Rules for waiver of any defect of form or substance which is not called to the attention of the trial court in writing before the instruction to the jury. Tex. R. Civ., p. 90; *Federal Underwriters Exchange* v. *Hinkle,* 187 S. W. 2d 122 (Tex. Civ. App. 1945, error ref'd want of merit); *Traders & General Ins. Co.* v. *Hill,* 161 S. W. 2d 1101 (Tex. Civ. App. 1942)."

It might interest counsel for respondent to learn that the cases it relies upon, dealing with the waiver of the want of verification of a plea of failure of consideration, are treated in the Law Review article under discussion, and the distinction pointed between the results reached in the two groups of cases.

REPLY TO POINT THREE OF RESPONDENT.

Respondent contends that the trial court erred in failing to permit it to amend its petition (requested for the first time during the taking of testimony), so as to destroy the conclusiveness of the presumption of the timely giving of notice. Aside from the fact that the statute creating the presumption made its attack possible only if a verified pleading contravening it had been on file at least seven days before trial, the question of allowing amendment was addressed to the sound discretion of the trial court.

The obvious purpose of the legislature of Texas in requiring that the verified denial must be filed not less than seven days before the case proceeds to trial was to permit advance preparation on the issue by the claimant. Even had there been no statutory limitation on the time within which an amendment could be allowed, yet no abuse of discretion on the part of the trial court appears in the record in the present case.

CONCLUSION.

We are struck with the Columbus-like courage of counsel for respondent, as manifested by the third and fourth sentences on page 10 of its brief. Of all Texas practitioners, such counsel seem to have been the first to have failed to verify a denial of the timely giving of notice as required by statute, because counsel realized that the form of the pleading would be governed by the Federal practice rather than the state practice. Most of us would have failed to verify through an oversight or an inability to conscientiously make the oath, and in no such spirit of derring-do.

We respectfully submit that the writ should be granted as earlier prayed for.

JOHN W. HARDY,
711 Bryant Petroleum Building,
Tyler, Texas,
JONES, BRIAN & JONES,
P. O. Box 347,
Marshall, Texas,
Counsel for Petitioner.

Of Counsel:

FRANKLIN JONES,
C. A. BRIAN,
Attorneys for Petitioner.

PROOF OF SERVICE.

I, Franklin Jones, hereby certify that I served the Respondent herein with a true and correct copy of the foregoing Reply of Petitioner to Brief of Respondent by depositing the same in the United States Post Office, with First Class Postage prepaid, and addressed to counsel of record for said Respondent at his post office address.

This the ..... day of ....., A. D. 1956.

.....,
Of Counsel for Petitioner.

MAR 10 1956
HAROLD B. WILLEY, Cle

No. 660

In the

Supreme Court of the United States

October Term, 1955

BILL G. BLUNT,

Petitioner,

v.

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,

Respondent.

REPLY OF RESPONDENT

HOBERT PRICE,
ROYAL H. BRIN, JR.,
300 Gulf States Building,
Dallas 2, Texas,
Counsel for Respondent.

Of Counsel:
STRASBURGER, PRICE, KELTON,
MILLER & MARTIN,
Dallas, Texas.

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REPLY OF RESPONDENT

To the Honorable Supreme Court of the United States:

Respondent does not wish to burden this Honorable Court unduly with briefs and arguments, but the "Reply of Petitioner to Brief of Respondent" contains some matters which should not be allowed to go unchallenged.

Most serious is the deceptive quotation from *27 Texas Law Review 565* appearing at page 7 of this Reply of Petitioner. What Petitioner characterizes as a "Law Review article" is in fact merely a casenote by an under-

graduate law student, although this, of course, does not necessarily detract from its value. The questionable factor, however, is the quoting of two sentences from this note out of context in such a way as to imply a position that is actually contrary to the real tenor of the note.

The portion quoted by Petitioner is as follows:

> "Prior to the Rules such presumption (of due notice) was conclusive regardless of lack of objection to a defective special plea. *Bedner v. Federal Underwriters Exchange*, 133 S. W. 2d 214 (Tex. Civ. App. 1939, error dism'd, judgm't correct). Since the Rules this has continued to be the holding of the courts despite express provision in the Rules for waiver of any defect of form or substance which is not called to the attention of the trial court in writing before the instruction to the jury. Tex. R. Civ., p. 90; *Federal Underwriters Exchange v. Hinkle*, 187 S. W. 2d 122 (Tex. Civ. App. 1945, error ref'd want of merit); *Traders & General Ins. Co. v. Hill*, 161 S. W. 2d 1101 (Tex. Civ. App. 1942)."

The immediately following sentence of the very same paragraph, pointedly ignored by Petitioner, proceeds to declare:

> "Later cases, pointing to the supremacy of Rule 90, cast serious doubt upon the validity of these authorities, since they speak of all defects in pleading as falling under this Rule. E.g., *Texas Indemnity Ins. Co. v. Watson*, 207 S. W. 2d 99 (Tex. Civ. App., 1947, rev'd on other grounds, 210 S. W. 2d 989 (Tex. Sup., 1948); *Shaw v. Porter*, supra; *Texas Osage Co-op Royalty Pool v. Kemper*, supra."

In the very next paragraph, this casenote goes on to state:

> "In speaking of the effect of Rule 90, it has been said that 'the protection against reversal on pleading points of *any* nature seems to be reasonably secure. If specific objection thereto is not made in writing, defects of form as well as substance are waived.' Stayton, Pleading Under New Federal and Texas Rules, 20 Texas Law Review, 16, 30 (1942)."

The Article in question by the eminent Judge Stayton further declares:

> "In Texas, faulty pleadings should never cause a reversal of justice on the merits; for if objection is not made, the error is waived, and if objection is made, the error, in reason, is cured."

Thus, Judge Stayton is here in accord with the position of Respondent that, even under the Texas procedure, defect in pleading such as lack of verification is waived if specific objection thereto is not made in writing, and that if such objection is made, the error could be cured by amendment.

Even the casenote writer, from whom Petitioner has borrowed a partial and incomplete quotation, has in fact taken a view in opposition to that of Petitioner, and the note further concludes with the statement that the very purpose of the reform in Texas pleading incorporated in the adoption of the Texas Rules of Civil Procedure in 1941

"would seem to require that Rule 90 should apply in such a situation."

It is also noted that Petitioner now apparently seeks to discredit the bill setting part of the record, stating it to be "at complete variance with the official transcript of the proceedings." Of course, the very reason that the bill was entered by the Court was that the reporter's transcript was understandably inaccurate in attempting to take down the rapidfire conversations back and forth between the Court and counsel. This bill was not only signed by the Court, but, as we previously pointed out, was approved by the signature of counsel for both sides. Thus, Petitioner not only did not object in any way to the bill, but actually approved the same through the signature of Petitioner's counsel. We agree, however, that it is of little moment whether the lack of verification was raised by the Trial Court or by Petitioner when the incident occurred.

It is noted that Petitioner continues to refer to "the statutory provision," "the presumption created by the Texas statutes," and "the statute creating the presumption." As was shown in Respondent's previous Brief, the statute in question, Article 8307b, is now of mere historical interest, and the status of the requirement of verification, as recognized by all of the cases since the adoption of the Texas Rules of Civil Procedure, is that of a Rule of

Court and it derives its present effect from Rule 93(n) of the Texas Rules of Civil Procedure.

In view of Petitioner's position in apparently attaching some magical significance to the wording of the requirement of verification in terms of a presumption, the case of *American Casualty & Life Co. v. Butler, 215 S. W. 2d 392, er. ref., n. r. e.,* becomes very pertinent. That case involved Art. 5546, Texas Civil Statutes, which sets forth the substantive law concerning contract stipulations for notice of a claim for damages (providing that such a stipulation must be reasonable and that the period within which notice shall be given must be no less than 90 days), and then goes on in the same article to make the procedural requirement of verification of a plea of want of such notice:

> "In any suit brought under this and the preceding article, it shall be presumed that notice has been given unless the want of notice is especially pleaded under oath."

The court holds that this requirement of verified pleading, worded as a presumption, is waived by failure to except to the answer on that ground, declaring:

> "Appellee did not except to appellant's failure to verify its pleadings, hence may not claim that, by appellant's defective plea, notice will be presumed by Art. 5546, Rule 90, Texas Rules of Civil Procedure."

The parallel to the present situation is clear. It is also to be noted that the procedural portion of Art. 5546 is now

contained in Rule 93(m) of the Texas Rules of Civil Procedure.

Respectfully submitted,

HOBERT PRICE,
ROYAL H. BRIN, JR.,
300 Gulf States Building,
Dallas 2, Texas,

By .....
Counsel for Respondent.

Of Counsel:
STRASBURGER, PRICE, KELTON,
MILLER & MARTIN,
Dallas, Texas.

CERTIFICATE OF SERVICE

I, Royal H. Brin, Jr., as one of counsel for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that I served true and correct copies of the foregoing Reply of Respondent upon Petitioner by depositing the same in the United States Post Office with first class postage prepaid, addressed to John W. Hardy, 711 Bryant Petroleum Building, Tyler, Texas, and Franklin Jones, P. O. Box 347, Marshall, Texas, Petitioner's attorneys of record, on this the ..... day of ....., 1956.

.....
Attorney for Respondent.